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No. 379

In the Supreme Court of the United States

October Term, 1948.

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION, *Petitioner,*

vs.

GRAND-HYDRO, A PRIVATE CORPORATION, *Respondent.*

Brief of Respondent Upon the Merits.

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BRIEF OF RESPONDENT UPON THE MERITS.

Statement.

Petitioner, Grand River Dam Authority, is a public corporation and an instrumentality of the State of Oklahoma, created by legislative act (Session Laws 1935, p. 150, Art. IV, Chap. 70, 82 O. S. A. 1941, Secs. 861-875) granting it, among other powers, the following powers and privileges:

> "The control, storing, preservation and distribution of the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid and other lands needing irrigation, and the conservation and development of forests, water and hydro-electric power of the State of Oklahoma." (Sec. 1 of Act.)

Petitioner was also empowered and authorized,

> "(b) To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein * * * *in the manner provided by general law with respect to condemnation.*" (Sec. 2(b) of said Act.) (Emphasis ours.)

The general law referred to had been determined by the controlling decision of the highest appellate court of Oklahoma and particularly by the case of *The City of Tulsa* v. *Creekmore*, 167 Okl. 298, 29 P. (2d) 101, in which case it was held that in condemnation proceedings the following principle was applicable:

> "In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test."

On February 17, 1939, petitioner brought this proceeding in a state court of Oklahoma against respondent and others to condemn lands necessary to the construction of a hydro-electric dam on Grand River, a non-navigable stream. The primary purpose of the project was generation of electricity; incidentally there was some flood control.[1] Petitioner invoked the jurisdiction of said state court

1. The resolution of the Board of Directors of petitioner which authorized the filing of the suit (R. 539), as well as petitioner's declaration of intention (R. 456), the federal license (R. 470, Art. 13) and other papers filed with or issued by the Commission, show the emphasis upon generation of electricity.

by virtue of the aforesaid act of the Oklahoma Legislature which created it and in so doing was exercising the sovereign power of eminent domain of the State of Oklahoma (R. 32). Petitioner maintained this position throughout the proceedings in the trial court and at no time amended its pleadings to allege or assert any rights or powers it might have acquired or obtained by virtue of the license it procured from the Federal Power Commission on July 26, 1939, after the filing of the condemnation petition (R. 475). Petitioner at no time based its right to condemn the lands upon the license or upon federal law.

In the trial court petitioner introduced its license over respondent's objection,[2] not for the purpose of showing any federal authorization to condemn lands (which petitioner was precluded from doing because in its condemnation petition it relied only on state authorization), but apparently for the purpose of having the license in the record for any effect it might have toward diminishing the amount of the award.

The respondent, Grand-Hydro, is a public corporation, organized and existing with charter granted and issued November 6, 1929, under the general corporation laws of Oklahoma (R. 113-119). On August 29, 1931, respondent was granted a license and permit by the Conservation Commission of the State of Oklahoma to construct and operate a hydro-electric power dam on said Grand River (R. 129-134). Thereafter respondent acquired the 1462.48 acres of land involved in this case, of which tract the 417-acre dam site lands involved in this case are a part, and which tract is but a part of the lands acquired by respondent (R. 123-127).

2. Respondent's objection served notice on the petitioner that the condemnation petition, in the view of respondent, is too narrow to support any claim by the petitioner of any rights derived from the Federal Power Commission or the United States (R. 458).

The petition shows that the dam site tract included all of the land necessary to the construction of the power dam for which petitioner was issued a license by the Federal Power Commission. (R. 33)

The permit and license granted to respondent by the Conservation Commission of Oklahoma found, as the state law required, that respondent had acted in good faith and was financially able to complete its project (R. 132-133).

The power market in the area having declined in 1930, 1931 and 1932, respondent desisted in its development of this project (R. 121). When the market turned upward in 1935 petitioner had been created and vested with the exclusive right to construct hydro-electric dams upon Grand River by the aforesaid legislative act of Oklahoma, effective July 29, 1935. Respondent for that reason could no longer proceed with its plans to construct said project and thereafter, in 1938, it transferred to petitioner certain water rights and lands and rights of entry in other lands (R. 135, 139, 47, 53, 54, 141), all of which were necessary for petitioner to begin construction of the hydro-electric project in this case. The state court has held that these transfers of land and rights of entry to the other lands were made without prejudice to respondent's right to be paid just compensation therefor in the event the parties could not agree upon the value to be paid and condemnation proceedings should become necessary (R. 97). Petitioner's hydro-electric project, including the construction of the Pensacola Dam, has been completed and placed in operation at a cost in excess of $22,000,000.00 (R. 565). The dam site lands of respondent involved in this case were used as the site of petitioner's Pensacola Dam.

No federal question was involved or decided by the

Supreme Court of Oklahoma in this case. The only substantial question presented by petitioner, and the only one decided by the Supreme Court of Oklahoma was the proper measure of compensation to which respondent was entitled in this condemnation proceeding brought by petitioner, an Oklahoma corporation, based upon Oklahoma law of condemnation.

Petitioner's assertion that a federal question was erroneously decided to its prejudice by the Supreme Court of Oklahoma, is based upon the argument that the court held that respondent might construct a project without obtaining a federal license (Points 1, 2, 5 and 6, Pet. for Cert. pp. 12-17), the argument that the state court has deprived the petitioner of the benefits of a right under the Federal Power Act (Point 6, Pet. for Cert. pp. 16-17), and upon the argument that the state court erroneously construed Sections 27 and 10(c) of the Federal Power Act, and Article 17 of petitioner's license (Points 3 and 4, Pet. for Cert. pp. 14-15).

ARGUMENT

I.

The decision of the court below is correct because of the application of State law which this Court must accept as final.

When the petitioner instituted this condemnation proceeding in February, 1939, the soverein power of eminent domain granted it by the State of Oklahoma was the only authorization it had to invoke the jurisdiction of the court. The license from the Federal Power Commission was not issued to petitioner until July 26, 1939.

In *Oakland Club* v. *South Carolina Public Service Authority*, (C. C. A. 4) 110 F. (2d) 85, it is said:

> "Under the Federal Power Act the * * * condemnor had an election to exercise the power of eminent domain either under the specified enumeration of the Federal Power Act or under the broader provision of the eminent dbmain act of the state of Carolina."

Title 12, Sec. 264, sub-division 2, Oklahoma Statutes Annotated, provides:

> "The petition must contain * * * a statement of the facts constituting the cause of action, in ordinary and concise language and without repetition."

There is no allegation that the condemnor had filed a declaration of intention with the Federal Power Commission, that it had applied for a license or that it had obtained or would obtain a license from the Federal Power Commission; that the construction of a project upon the condemnee's land would affect the navigable capacity of the Arkansas River; that the Federal Power Commission had determined that such construction would affect such navigable capacity, or that the Grand River was either navigable or non-navigable. The petition in condemnation initiated and now supports only a taking by a state-created and state-owned agency, acting soley in that capacity.

Condemnation of property is derogatory of common law private property rights. Eminent domain statutes are always strictly construed. Plaintiff of necessity had to both possess and establish statutory authorization granted it by the sovereign power of the state or the United States. Its statutory grant of authorization from the State of Oklahoma was sufficient to invoke the jurisdiction of the state court to determine every issue necessary in said condemnation proceedings. If petitioner had other rights by authorization of federal law, it should have pleaded them in compliance with the Oklahoma statute. Petitioner cannot now

assert for the first time the infringement of any rights it may have had by authorization of federal law to exercise the power of eminent domain in this case, which rights it did not elect to assert but which it excluded from the state court's consideration by its election not to exercise the power of eminent domain authorized by the federal statute.

It is well established in the Oklahoma courts that a party will not be permitted to rely upon matters which that state's rules of procedure require to be set forth in the pleadings. In the case of *Butterrick Co.* v. *Molen*, 138 P. (2d) 89, it is said:

> "* * * It is well settled that parties will not be permitted to argue in this court for the first time questions not raised in the trial court by the pleadings in that court or where a party tries his case upon one theory in the trial court he will not be permitted to change and prevail here upon another theory and upon issues not presented to the trial court. See *Secrest* v. *Williams*, 185 Okl. 449, 94 P. (2d) 252; *Steiner* v. *Hughes*, 172 Okl. 268, 44 P. (2d) 857; *Harris* v. *Spurrier Lumber Co.*, 130 Okl. 99, 265 P. 637, and cases cited therein."

The judgment of the state court was therefore of necessity limited to the matters put in issue by the pleadings. In *Reynolds* v. *Stockton*, 140 U. S. 254, 267, 268, 269, 35 L. ed. 464, 468, 469, this Court said, referring to the case of *Munday* v. *Vail*, 34 N. J. L. 418:

> "It was held * * * that the general language in the decree was limited by the matters put in issue by the pleadings. We quote from the opinion: 'The inquiry is, Had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: *First*, the court must have cognizance of the class of case to which

> the one to be adjudged belongs; *second*, the proper parties must be present; and *third*, the point decided must be, in substance and effect, within the issue. * * * It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises.' * * *"

It necessarily follows that the only issue before the state court was the measure of compensation in a condemnation proceeding under the constitution and general law of Oklahoma. This is exactly the way that this case is treated in the first opinion of the state court. That opinion obviously treats this case as raising questions only under state law. There is no mention or decision of any federal question in the case.

When the case was decided a second time by the state court, the first opinion was treated as being the law of the case and therefore decisive. Therefore this was a decision rendered upon the second appeal fully supported by matters of state law. It follows that it is immaterial that the court may have proceeded further to speak of the federal license and casually refer to the Federal Power Act. *Hale* v. *Akers*, 132 U. S. 554; *Enterprise Navigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157; *Fox Film Corporation* v. *Muller*, 296 U. S. 207, 80 L. ed. 158.

Federal questions which might have been raised if the petitioner had amended its petition to aver its federal license cannot be considered by the Supreme Court of the United States. *Kipley* v. *State of Illinois*, 170 U. S. 182.

Furthermore, the petitioner is estopped in this case from attacking the validity of the water rights held by respondent and respondent's right to exercise those rights. The essence of petitioner's position in this case is that the award was erroneous, either because respondent actually had no right to use the water of Grand River or because such right could not be permitted to enhance value unless respondent or its ordinary grantee had a federal license.

Petitioner itself selected the state court of Oklahoma as the forum for this proceeding. If, under the state law, petitioner has disabled itself from asserting the position just referred to, this Court cannot help the petitioner.

Even if the petitioner be regarded as an arm of the state, it is engaged in a proprietary function in entering into the field of generation and sale of electric power and is subject to the rules of estoppel. In the case of *Grand River Dam Authority* v. *Grand Hydro*, 188 Okl. 506, 111 P. (2d) 488, in which the petitioner claimed that it should not be required to pay certain costs of the case, the court said:

> "The Authority is a governmental agency • • • with power to sue and be sued. Its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. (p. 489)
>
> "The Authority cannot exercise the powers as conferred upon it, avail itself of judicial process and, in the absence of legislation relieving it, escape the usual incidents of litigation that fall upon private litigants." (pp. 489-490)

It appears from this record that in the previous case of *City of Tulsa* v. *Grand Hydro*, to which both petitioner and respondent (R. 218) were parties, the petitioner filed in

the District Court of Mayes County, Oklahoma, on January 18, 1938, (R. 217) its answer and cross-petition, and among other things asserted in its answer that "The Grand River Dam Authority has by virtue of the assignment from the Grand Hydro of all its rights, interest and privileges in, to or concerning the waters of Grand River * * *, the prior right to appropriate all of the waters of Grand River and its tributaries to the beneficial uses set forth in the application of Grand Hydro filed with the Conservation Commission on July 14, 1931." (R. 213) The assignment itself is attached as an exhibit to the said answer and cross-petition (R. 214-217). The petitioner, relying upon the assignment, sought and obtained a favorable adjudication in said case. (R. 100) (Op. of court, R. 192, *et seq.*)

The recitals of the assignment which petitioner accepted, the reliance by the petitioner upon the assignment from the respondent, the above formal assertion by the petitioner in a pending suit, and petitioner's procurement of a favorable decree as a consequence, estop the petitioner from trying to retract from the position there taken by now asserting that respondent could not enjoy, and did not even own, water rights. See *State* v. *Sheil*, 176 Okl. 73, 54 P. (2d) 1030; *Craig* v. *Roxoline Petro. Co.*, 170 Okl. 307, 39 P. (2d) 575, 577; *Cressler* v. *Brown*, 79 Okl. 170, 192 Pac. 417.

The fact that the judgment in the City of Tulsa case was a consent decree does not render it less effective as a bar or estoppel than one rendered upon contested trial. See 34 C. J. 779, Sec. 1198, and cases there cited.

The Oklahoma court applied that rule here in its first opinion (R. 100). This was accepted as part of the law of the case in the state court's second opinion. Therefore the

petitioner's claim, that federal factors constricted or annulled respondent's rights to use water to the point where they cannot be considered in determining value, is one that it cannot be heard to make, as matter of state law. Where that is true, this Court will affirm the state court's decision regardless of the correctness or error of any decision the state court may have proceeded to reach on the federal questions. *Hale* v. *Akers*, 132 U. S. 554; *Enterprise Navigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157.

The application of this estoppel will not prejudice the federal government, which is not a party to this proceeding, and it will remain free to deny, if it chooses, that petitioner is entitled to include the amount of the award in its "net investment." If the federal government, however, has bound itself by appearing as *amicus curiae*, that was simply a mistake from its standpoint, and will have no effect beyond this particular project.

The record discloses that it was not necessary for the state court to decide any federal question, it did not decide any such question, and indeed no such question arose in the case. This Court has no jurisdiction. See annotation, 84 L. ed. 925, *et seq.*

II.

In a controversy involving the nature of the rights of a riparian owner either upon a navigable or non-navigable stream, this Court will accept as conclusive the State Court's views of the nature of such rights.

The respondent as a riparian owner contended below that it was entitled to recover the value of its lands based upon their adaptability as a dam site. It is said by the petitioner and the Solicitor General that such adaptability may not be shown since the respondent as a riparian owner had

no right as such to use the waters of Grand River for the purpose of generating hydro-electric power. In the brief of the Solicitor General (p. 14) he states:

> "There can be no doubt that the court below recognized a right of property in the use of the Grand River waters for power project purposes. And it is equally clear that in holding there was such an interest the court below decided a federal question if, under the Constitution and laws of the United States, there is room for the contention that there can be any such private property. We submit that the court erred in awarding compensation for an interest which is not property within the meaning of the federal law applicable to the situation at bar."

It is true that the court below did recognize a right in respondent to the use of the waters of Grand River for power project purposes. And in doing so the court followed the great weight of authority as expressed in *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 99 F. (2d) 902. Judge THOMAS of the Circuit Court of Appeals of the Eighth Circuit in the opinion in the *Pike Rapids Power Co.* case in discussing the riparian owner's right upon a navigable stream and particularly the riparian owner's right to construct a dam upon said stream, used this language:

> "The United States in granting through the Commission to the plaintiff a license to construct the dam exercised the same constitutional power which was exercised when the defendant was authorized to build its bridge. That was the paramount right of the government to regulate the flow of the river and the placing of obstructions in its bed in the interest of navigation. As observed, *supra*, pending the obtaining of the license the right to construct the dam as an appurtenance to the fast land was suspended by federal statutes, but was not abolished. The riparian right to build the

dam at no time ceased to exist, but such right was at all times servient to the supreme power of the federal government to regulate its exercise insofar as such regulation is appropriate to the interests of navigation. Such regulation is not, as shown above, for the interest of the defendant as a common carrier engaged in interstate commerce."

The state court then in recognizing a right in Grand-Hydro to build a dam in the waters of Grand River is supported by the language just quoted. In deciding that Grand-Hydro had a right to the use of the waters of Grand River although it did not have a license from the Federal Power Commission, the court below did not decide a federal question as asserted by the Solicitor General, since the question of the nature and extent of the rights of a riparian owner upon either a navigable or non-navigable stream are matters of state law to be determined by the statutes and judicial decisions of the state.

This Court has consistently held that the nature and extent of the rights of a riparian owner, even upon navigable waters within a state, are matters of state law to be determined by the statutes and judicial decisions of the state. In *Fox River Paper Co.* v. *R. R. Commission*, 274 U. S. 650, 71 L. ed. 1279, the court said:

"Although presumptively title to the soil under navigable waters within the state is in the state (*Massachusetts* v. *New York*, 271 U. S. 65, 89, 70 L. ed. 838, 849, 46 Sup. Ct. Rep. 357; *United States* v. *Holt State Bank*, 270 U. S. 49, 54, 70 L. ed. 465, 468, 46 Sup. Ct. Rep. 197), the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state. (*Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.*, *supra*, 35 L. ed. 1010, 12 Sup. Ct. Rep.

173; *Packer* v. *Bird*, 137 U. S. 661, 669, 34 L. ed. 819, 820, 11 Sup. Ct. Rep. 210; *Hardin* v. *Jordan*, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; *Barney* v. *Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228.) * * *

"We accept as conclusive the state court's view of the nature of the rights of riparian owners. We therefore find in the refusal of the Commission to grant the permit no denial of the property rights of plaintiffs, and hence no violation of the 14th Amendment. Compliance with Sec. 31.09 is the price which plaintiffs must pay to secure the right to maintain their dam. Cf. *Booth Fisheries Co.* v. *Industrial Commission*, 271 U. S. 208, 70 L. ed. 908, 46 Sup. Ct. Rep. 491."

See also, *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 55, 65 L. ed. 500, and *St. Anthony Falls Water Power Co.* v. *Board of Water Commissioners of the City of St. Paul*, 42 L. ed. 497, 168 U. S. 349.

In *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. R. Co., supra*, the court said:

"It is settled by a long line of decisions, in addition to the cases already cited, that the rights and liabilities of the parties are to be determined by the laws of Minnesota. *Barney* v. *Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224; *Hardin* v. *Jordan*, 140 U. S. 371, 380, 11 S. Ct. 808, 838, 35 L. ed. 428; *Mitchell* v. *Smale*, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. ed. 442; *Archer* v. *Greenville Sand & Gravel Co.*, 233 U. S. 60, 66, 34 S. Ct. 567, 58 L. ed. 850. This results from the fact that the shores of navigable waters, the soil thereunder, and the rights appurtenant thereto were not granted to the United States by the constitution, but were reserved to the states respectively, *Johnson* v. *Knott*, 13 Or. 308, 10 P. 418; and 'the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.' *Pollard's Lessee* v. *Hagan*, 44 U. S. 212, 230, 3 How.

212, 11 L. ed. 565; *Mumford* v. *Wardell*, 73 U. S. 423, 436, 6 Wall. 423, 436, 18 L. ed. 756."

From the above cases it is seen therefore that there is no room for the contention that there can be no right in the riparian owner to the use of the waters of the stream. Under federal law as it has been written by this Court and all of the federal appellate courts in the nation, the nature of a riparian owner's rights, including the right to the use of the waters of the stream are questions of local law except perhaps in those cases where private rights come into conflict with the United States Government acting in its sovereign capacity by virtue of the powers vested in it by the commerce clause of the Constitution. No such conflict exists in the case at bar.

It follows therefore that the controlling issue in this case is one which must be decided by the provisions of the statutes and the judicial decisions of the State of Oklahoma. The case of *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 90 L. ed. 1143, 328 U. S. 152, is in harmony with the cases cited above. Therein it was said:

> "When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights, or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service. Section 9 (b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in Sec. 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally

in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects."

It is also true that the measure of compensation in a condemnation action, such as this one, is controlled by local law. See *Central Nebraska Power & Irrigation Dist.* v. *Fairchild*, 126 F. (2d) 302; *Feltz* v. *Central Nebraska Power & Irrigation Dist.*, 124 F. (2d) 578, and *McGinley* v. *Central Nebraska Power & Irrigation Dist.*, 124 F. (2d) 692.

III.

No Federal Question Is Presented.

The very fact that, as shown above, petitioner filed this condemnation proceeding in its capacity as a state authorized condemnor, and not in its capacity as a federal licensee, and the fact that petitioner is estopped, preclude the presence of a federal question in the case. Inasmuch as petitioner not only failed to allege any federal authorization or any federal immunity, but also is estopped by state law, it follows that the petitioner must pay the compensation determined by the application of the laws of Oklahoma in the courts of that state.

The petition for writ of certiorari readily confesses at page 2 that "ordinarily the measure of compensation in a condemnation proceeding does not involve a federal question," and further says:

> "It is not claimed that the state Supreme Court could not have eliminated the federal question by holding that respondent was entitled to have its compensation determined on the basis of the adaptability of its dam site lands for dam site use without having the right to place the lands to such use."

Petitioner quotes from the first opinion in this case, where the court said: "* * * The rule for the measure of compensation * * * applies only to those adaptable uses to which the condemnee or his ordinary grantee, may lawfully place the land." (Pet. for Cert., p. 2.) The petitioner reasons that, inasmuch as the court approved the award in this case which allowed value for dam site purposes, the court was holding that respondent could develop the lands though lacking a federal license.

The Oklahoma court very clearly decided, *first*, that the petitioner was entitled to a judgment of condemnation in this case, the petitioner being the one possessed of all legal rights and permits to go ahead; and, *second*, the court certainly approved the award of $800,000.00 to the respondent, which included dam site value. The second part of this holding was accompanied by the court's determination that respondent must be treated as the owner of its state rights since that was the agreement of the petitioner at the time of the assignment of water rights and the execution of deeds to the petitioner in 1938; by the further determination that respondent's rights under the state law were not annulled by the mere enactment of the Grand River Dam Authority Act; and finally the court accompanied its approval of the award with this language:

> "When the very able argument of the plaintiff in error, on all points except that relating to interest, is summarized and condensed, it can be stated as one proposition: that, by reason of the legislative act creating the Authority, and the issuance of a permit to it by the Federal Power Commission, the value of the land as a dam site was for the special purpose of the taker, the only party who can use it for that purpose. Many authorities are cited to the effect that if the taker is the only one who can use the land for a particular purpose,

its value therefor is not an element in fixing the market value. Paramount among the authorities cited are *Eichman* v. *The City of Oklahoma City*, 84 Okl. 20, 202 P. 184, and *United States* v. *Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877. In all of the cases relied upon, the taker, inherently, was the only one who could use the property for the specific purpose, usually a governmental function, or the condemnee did not have the power of eminent domain necessary to acquire all the lands needed to use the tract for such purpose.

"In the case at bar the condemnor was, by legislative act, exclusively authorized to use the Grand River for hydro-electric power, but the use was in the nature of a business enterprise and the condemnee was also possessed of the power of eminent domain." (R. 675)

In the quoted language the court was specifically dealing with the contention that the respondent could not receive this value because the petitioner had the exclusive right to develop under both the state act and the federal license.

Thus it is observed that the court clearly recognized that petitioner was the only person who could develop this site.

The court recognized the validity of the license: *First*, in its language above quoted wherein it discusses the rule which disallows the value to the taker; *second*, by its language with respect to the provision of the Federal Power Act which requires the licensee to pay all damages to the property of others (if the court had not regarded the federal license as valid it would not have argued that the license obliged petitioner to pay these damages); and *third*, in sustaining the suit.

The state court charged the jury as follows in Instruction No. 10:

> "You are instructed, gentlemen of the jury, that in fixing the just compensation to be paid Grand-Hydro in this case, you should put out of consideration entirely the fact that Grand-Hydro was not possessed of a license from the Federal Power Commission authorizing it to appropriate the waters of Grand River to beneficial use." (R. 623-624)

Perhaps the petitioner claims that the approval of this instruction by the Supreme Court of Oklahoma amounts to a decision that the license was not necessary to the *development*. Such a contention would be erroneous because the court was simply saying that the license need not be held in order to prove dam site value. (*Metropolitan Water District* v. *Adams*, (Sup. Ct. Calif.) 116 P. (2d) 7.) No federal question is presented by this instruction because the court was simply telling the jury how to arrive at the value under the state law, and was not disregarding the validity of the requirement of a federal license.

Referring to the pronouncement of the state court, it will be noted that the court referred to adaptable uses to which the condemnee "or his ordinary grantee" may lawfully place the land. Since the court, in using the quoted phrase about grantees of the condemnee, is obviously looking into the future, the court cannot be understood as requiring the condemnee shall have a license *now* in order to be entitled to the value of the property. The very use of the phrase "or its ordinary grantee" dispenses with any necessity of present possession of a license. The petitioner's showing that Grand-Hydro had never applied for a federal license and had never received one, fails completely to disprove that Grand-Hydro's ordinary grantee might quickly get a license.

Furthermore, is not the petitioner an "ordinary gran-

tee" of the respondent? A formal assignment of the water rights, formal deeds conveying property and a letter of permission to enter the lands had all been executed by respondent and delivered to the petitioner long before this case was filed. (R. 135-139, 47, 53, 54, 141). Literally, even the strained construction of the court's opinion that opposing counsel urges has been satisfied. And this does not involve allowing value to the taker, but merely amounts to dispensing with a technical requirement that petitioner urges as a condition precedent to the determination of market value.

Petitioner cannot rely on its own possession of a federal license as proof that no one else would ever get a federal license, because it did not bring this suit in its capacity as a federal licensee, and events may have transpired or may still transpire resulting in petitioner's loss of its federal license so that the way may be opened for another to obtain such license.

There is no difference in principle between this case and any other condemnation case. In every such valid proceeding the condemnor's power to take has amounted to a revocation of every right of the condemnee, whether by license, common law, statute or otherwise, to use the property. And this is true, regardless of whether condemnee wants to farm it, build on it, drill it or use it in any other way. Yet no court has ever denied just compensation simply because the condemnor has the right to take.

IV.

Petitioner's license did not vest in it any of the sovereign rights of the United States in and to the waters of Grand River.

The petitioner's contention rests upon the assumption that a licensee under the Federal Power Act is vested with the sovereign power granted to the United States in the exercise of its dominant rights over the waters of the streams of the nation over which Congress has jurisdiction. It also contends that under the Federal Power Act all of the riparian rights of respondent were abolished. That since respondent therefore was possessed of no riparian rights petitioner was not required in condemning respondent's lands to pay dam site value therefor.

The brief *amicus curiae* of the Solicitor General of the United States contends (pp. 13-16) that Section 10 of the River and Harbor Act of March 3, 1899, C. 425, 30 Stat. 1121, 1151, 33 U. S. C. A. 403, and said Federal Power Act as amended prevents the existence of power site value in respondent in this case.

The positions of petitioner and the Solicitor General are untenable and find no support whatsoever in the authorities. The authorities they cite are cases in which the United States, and not a licensee, was held to have a paramount right to the bed and waters of a navigable stream to regulate commerce and navigation, and each of the cases cited specifically excludes from consideration the riparian owner's rights in cases where the United States is not a party.

In *Pike Rapids Power Co.* v. *Minneapolis, etc., R. Co.*, (C. C. A. 8) 99 F. (2d) 902, the power company was licensed under the Federal Power Act of June 10, 1920, and the railroad company was licensed under the River and Harbor

Act of March 3, 1899. At page 908 the court observed that defendant railroad company contended:

> "The common law riparian right to build a dam has been completely abolished by the Rivers and Harbors Act of March 3, 1899, C. 425, 30 Stat. 1151, 33 U. S. C. A. 401. * * * "

With reference to that contention the court said (p. 908):

> "It will be observed that the riparian right to build a dam is not absolutely abolished by this statute; the right is suspended only until the consent of Congress is obtained and the plans approved have been approved by the designated officers. The statute merely regulates the use of the right; it does not abolish it. The federal government derives its authority over the navigable rivers of the United States from the commerce clause of the Constitution, U. S. C. A., Const., Art. 1, Sec. 8, cl. 3; and that clause purports to delegate only the power to regulate interstate and foreign commerce. Unless Congress, therefore, should find it necessary in the regulation of commerce to abolish riparian rights it has no power to do so. Nothing in the statute, nor in its administration by the Chief of Engineers and the Secretary of War, nor in subsequent acts of Congress gives any support to the contention that Congress ever intended to take away such rights. Indeed, the decisions of the Supreme Court rendered since 1899 disclose that such riparian rights, subject to the power of Congress to regulate their use to conform to the requirements of interstate commerce, are recognized by the federal government since the passage of that act, the same as they were before. See *United States* v. *River Rouge Improvement Co.*, (1926) 269 U. S. 411, 46 S. Ct. 144, 70 L. ed. 339; *United States* v. *Chandler-Dunbar Water Power Co.*, (1915) 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063; *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, (1913) 229 U. S. 82, 33 S. Ct. 679, 57 L. ed. 1083, Ann. Cas. 1915A, 232. The statute is intended

only to protect the paramount right of the United States to control the use of the river in the interest of navigation."

At pages 909, 910, and 911 in deciding that a federal licensee is vested with no power to take private rights without payment of compensation, the court said:

"* * * It is elementary that when Congress gives its consent to the exercise of any privilege within the constitutional jurisdiction of the federal government, it may impose conditions. * * * It is equally fundamental that such consent of Congress to the exercise of the privilege does not carry with it any right not strictly federal. It grants no right to the person given the privilege to invade rights strictly within the jurisdiction of the state. * * *

"The further argument of defendant that because it is a public service corporation with right of eminent domain and its bridge is an instrumentality of interstate commerce it stands in respect to the riparian rights of plaintiff in exactly the same position as the government itself, is erroneous. If such were the rule, it would apply with equal force to the powers of the plaintiff because the plaintiff is also a public service corporation with the right of eminent domain. But the United States does not share its sovereign power to regulate interstate commerce with the agencies that carry on such commerce, whether they be corporations or individuals. * * * Riparian rights in the Mississippi River are servient to the paramount right of the United States to regulate commerce and navigation, but not to the right of railroad companies to build bridges, nor even to power companies to build dams. In the exercise of its paramount right the United States and its agents, acting in its name and to accomplish its purpose may use the bed of the river without compensation to the riparian owner. That is because the riparian rights are servient. *James* v. *Dravo Contracting Co., supra.*

* * * The federal government is not engaged in the business of interstate commerce. It only regulates those who are engaged in that business; * * * and neither by the Soo Bridge Act nor by the Rivers and Harbors Act did the government appoint the defendant its agent nor authorize the defendant to take away anybody's private rights without compensation. * * *

"The bed of a navigable river is not inherently subject to every public use by anybody who may wish to use it without compensation. It is servient only to the paramount rights of the federal and state governments; to the federal government for use in aid of navigation and to the state government for such public uses as are under its control. It is not servient to the right of public service corporations to build bridge piers or dams. The fact that defendant is engaged in interstate commerce does not render its business a public business. It is a private business affected only with a public interest and therefore subject to public regulation. Its property is not public property; * * *"

When this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 424, 85 L. ed. 243, 261, said that,

"The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable',"

and cited *United States* v. *Chandler-Dunbar Power Co.*, 229 U. S. 53, 64, 65, as authority for that statement, it only announced the well settled principle that flowing waters are not susceptible of ownership—not even by the United States. The right of the riparian owner is not based upon any ownership of the flowing water but is based upon his riparian property right to the use of the water. That property right has always been a private one and has been so

recognized and is still so recognized by this Court although it is servient to the paramount or dominant right of the United States under the commerce clause of the Constitution to regulate commerce and navigation.

The fact that the property right of a riparian owner to the use of the flow of a navigable stream is servient to the dominant right of the United States to regulate commerce and navigation of course means that the United States will not be liable in damages although its regulatory action curtails private rights. The cases cited in the brief *amicus curiae* are cases in which the United States was exercising its dominant right, under the commerce clause of the Constitution, and therefore they can have no application to this case which is one between two Oklahoma public service corporations, and the stream is non-navigable.

At page 15 of said brief *amicus curiae* the Solicitor General states:

> "The rationale of the *Chandler-Dunbar* decision and of others since announced appears from the statement of the court that 'whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. * * * Congress has of course excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of navigation.' 229 U. S. at 69, 71, 72. That rationale permits of no distinction of the instant case on the grounds that non-navigable waters are involved and that the condemnor is not the United States but one of its licensees. For in this case, just as in *Chandler-Dunbar* and the others, the respondent has no right to construct and maintain those structures which are 'essential to the utilization

of the power of the stream for commercial purposes.' See *supra*, pp. 12-14."

The rationale of the *Chandler-Dunbar* case not only permits of a distinction between the sovereign right of the United States to regulate commerce and navigation and the right of a licensee under the Federal Power Act to construct and operate a hydro-electric project, but it permits of no other construction. In the *Chandler-Dunbar* case the condemnation proceedings were brought by the United States pursuant to Act of Congress of March 3, 1909, which act declared that the lands being condemned were absolutely necessary "for purposes of navigation of waters and waters connected therewith." (See page 59 of 229 U. S., and page 1078 of 57 L. ed.) In that case Congress had excluded all power dam projects from the waters of the St. Mary River until the law was changed. No similar Act of Congress has ever been passed affecting the waters and riparian lands of Grand River in this case, even if Congress has power to enact such legislation which for the determination of this case it is not necessary to decide. Had such an act been passed affecting Grand River the petitioner and respondent would both have been in the position of the Chandler-Dunbar Company and this case could not have arisen.

The first part of the quotation by the Solicitor General omits language which shows the very distinction he argues does not exist. In the same paragraph of the *Chandler-Dunbar* opinion the court also said:

"* * * We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or non-navigable streams as between each other. * * * That riparian owners upon public navigable rivers have in addition to the rights common of

the public, certain rights to the use and enjoyment of the stream, which are incident to such ownership of the bank, must be conceded. * * * But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in navigation of the river." (Citing cases.)

In the case at bar petitioner is merely a licensee of the Federal Power Commission. Petitioner has no paramount power or right to regulate commerce and navigation. Its license from the Federal Power Commission, as we will hereinafter demonstrate, gave it no authority to construct a dam upon the respondent's property. It was, however, by the license granted the legal right to construct the project after it had purchased the properties of the respondent, or had condemned said lands in accordance with local law.

That a licensee under the Federal Power Act is not vested with any of the constitutional rights of the United States in and to the waters of a navigable stream, or non-navigable tributary of a navigable stream, clearly appears in the case of *Ford & Son* v. *Little Falls Co.*, 280 U. S. 369, 50 S. Ct. 140, 74 L. ed. 483. In that case the petitioner, a business corporation, licensed by the Federal Power Commission, placed flash boards on the crest of its dam in the Hudson River as its license permitted, which raised the level of the water and impaired the value of respondent's power dam, also under federal license on the Mohawk River, a navigable tributary of the Hudson. Respondent in the state court recovered damages and an injunction restraining petitioner from maintaining the flash boards on the crest of its dam. At page 487 the court said:

"* * * To avoid this liability, petitioner relies on the federal right or immunity specially set up by its answer, that the Hudson and Mohawk are navigable rivers; that all of the acts complained of were done under the license and authority of the Federal Power Commission and under regulations of the Secretary of War, authorized by the Water Power Act; that the license and the acts of petitioner authorized by it were found by the commission to be desirable and justified in the public interest for the purpose of improving and developing the Hudson River for the benefit of interstate commerce, and that the petitioner, acting under the license, is an agency of the federal government, in the exercise of its power to regulate commerce and navigation."

At page 378 of 280 U. S., 488 of 74 L. ed., the court said:

"It is argued that Congress, by the Federal Water Power Act, has authorized the Commission to develop navigation and for that purpose to establish obstructions in navigable waters and, subject only to the constitutional requirement of compensation for property taken, its power when so exercised is supreme; that the present exercise of that power does not amount to a taking of the respondent's property. * * *"

The court disagreed with petitioner's contention that it was a federal agency and held that petitioner's license did not exonerate it from liability in damages to respondent's power dam, and in that connection said:

"Section 10 (c), Title 16, U. S. C., Sec. 803 (c), provides that licensees 'shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation' of the licensed project, and by Sec. 27 (Title 16, U. S. C., Sec. 821) it is provided: Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states

relating to the control, appropriation or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein. By Sec. 21 (Title 16, U. S. C., Sec. 814) licensees are given the power of eminent domain and authorized to conduct condemnation proceedings in the district of state courts for the acquisition 'or the right to use or damage the lands or property of others necessary to the construction, maintenance or operation of any dam * * * (or) * * * diversion structure * * *' in connection with an authorized project which they are unable to acquire by contract. By Section 6 (Title 16, U. S. C., Sec. 799) all licenses are required to be conditioned upon acceptance by the licensee of all the terms and conditions of this act."

The question of determining the just compensation in a condemnation proceeding for taking riparian land or whether adaptability for dam site might be considered in estimating its fair market value was not an issue in the *Ford* case. That case, however, does definitely decide that petitioner by virtue of its license issued by the Federal Power Commission was not an agency of the federal government since by Section 10 (c) of the Federal Power Act petitioner was required to pay damages which the same section provides the United States would not have been liable to pay. Had petitioner been held to be an agency or instrumentality of the United States, as contended, and if the damage had been the result of navigation improvement work, then the rule of *United States* v. *Willow River Power Co.*, 324 U. S. 499, 89 L. ed. 1101, would have applied. In that case the United States, acting under the commerce clause of the Constitution, raised the level of waters and impaired water power without flooding any fast land, and was held not liable in damages. But even in that case the court in deciding the issue excludes from consideration cases

where the litigation was between private litigants and the United States not a party, and particularly emphasizes the difference between navigable and non-navigable streams. In that case the court said:

> "* * * But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute 'property rights' in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a 'property right;' whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests. Whether they are such interests may depend on the claimant's rights in the land to which he claims the water rights to be appurtenant or incidental; on the navigable or non-navigable nature of the waters from which he advantages; on the substance of the enjoyment thereof for which he claims legal protection; *on the legal relations of the adversary claimed to be under a duty to observe or compensate his interests; and on whether the conflict is with another private riparian interest or with a public interest in navigation.*" (Emphasis ours.)

There is no dispute as to the legal relation of the respondent and its adversary. The conflict here is between riparian owners and as between them there is no "public interest in navigation."

In *United States v. Central Stockholders' Corp.*, (C.

C. A. 9) 52 F. (2d) 322, 332, in applying the principle announced in *Ford & Son* v. *Little Falls Co.*, *supra*, it is said:

> "The Supreme Court held in the *Ford* case, in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the government so to do. On the contrary, the general purpose of the act was to permit what would otherwise be an infringement of the rights of the federal government and an interference with navigation, that is to permit a purpresture, requiring the permittee, however, to make due compensation where the project involved the taking of private property. * * *
>
> "* * * that case definitely determines that the permittee is by express provision of the Federal Water Power Act required to pay all damages inflicted by it upon private property rights. This conclusion is wholly inconsistent with the proposition that it was the intention of Congress that the permittee should be able to set off the rights of the government, whatever they might be, as against the rights of other owners of the water. In short, it is obviously not the intention of Congress to vest in the permittee any of its rights in and to the waters of the stream which are inconsistent with the rights of other owners, except in so far as the authority of the federal government to carry out the project authorizes the taking of private property with just compensation to private owners. * * *"

In *Broad River Power Co.* v. *Query*, 288 U. S. 178, 180, 77 L. ed. 685, 687, in a state tax case where the power company contended that being a licensee under the Federal Water Power Act (16 U. S. C. A., chap. 12) it was a federal agency, the court said:

"It is apparent, however, that complainant in generating and selling power is not acting as an agent for the government. It acts with the government's permission; and while it may be said to have received a privilege from the government, it is not a privilege to be exercised on behalf of the government. * * *"

See, also, *Susquehanna Power Co.* v. *State Tax Commission*, 283 U. S. 291, 75 L. ed. 1042.

The fact that a federal license is used also as a means of government control of the licensee's business does not change the rule. *Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17, 23, 78 L. ed. 622, 627.

V.

The market value of respondent's lands was not affected by the fact petitioner was a licensee of the Federal Power Commission, empowered under certain terms and conditions to build a dam at the Pensacola site.

The petitioner throughout this entire proceeding has consistently urged the proposition that since the passage of the Grand River Dam Authority Act. (Art. 4, Chap. 70, Session Laws 1935, 82 O. S. 1941, Secs. 861-881) it alone was entitled to utilize the water of Grand River for the purpose of generating hydro-electric power and that since it had also applied for and secured a license from the Federal Power Commission for the construction of the dam on said river, respondent could not establish the value of its lands in the condemnation proceeding by showing that such lands were adaptable for a dam site and for the generation of hydro-electric power. The Supreme Court of Oklahoma properly rejected such contention so made by the petitioner (R. 670). The Supreme Court of Oklahoma in its last opinion (R. 675) in discussing the subject of whether respondent was deprived of its right to show the adaptability of its

lands for dam site value by the passage of the state statute, said:

> "Appellant contends that the passage of the act creating the authority was in effect a forfeiture of the Grand-Hydro permit and therefore it was not entitled to recover the dam site value of the lands condemned. If such was the intent of the Legislature in passing the Act it was in violation of the Constitution, Art. 2, Sec. 24. The state cannot through its law making body remove the principal value of private property and through its established agency acquire the property by condemnation, basing the reimbursement to the owner on the reduced value. If it were otherwise it would be possible to circumvent the above section of our Constitution."

The court then in discussing the point made by the petitioner to the effect that, since it held a license from the Federal Power Commission, evidence of the adaptability of the lands for dam site purposes was not competent, stated (R. 675):

> "When the very able argument of the plaintiff in error, on all points except that relating to interest, is summarized and condensed, it can be stated as one proposition; that, by reason of the legislative act creating the Authority, and the issuance of a permit to it by the Federal Power Commission, the value of the land as a dam site was for the special purpose of the taker, the only party who can use it for that purpose. Many authorities are cited to the effect that if the taker is the only one who can use the land for a particular purpose, its value therefor is not an element in fixing the market value. Paramount among the authorities cited are *Eichman* v. *The City of Oklahoma City*, 84 Okl. 20, 202 P. 184, and *United States* v. *Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877. In all of the cases relied upon, the taker, inherently, was the only one who could use the property for the specific purpose, us-

> ually a governmental function, or the condemnee did not have the power of eminent domain necessary to acquire all the lands needed to *sue* the tract for such purpose."

That the decision of the Supreme Court of Oklahoma on the point under discussion was correct is made apparent by an understanding of what the license from the Federal Power Commission actually granted to petitioner as its licensee. The licensee granted by the Federal Power Commission long after this action was commenced did not unconditionally empower petitioner to construct a dam upon respondent's property. The license only granted the permission or privilege to construct a hydro-electric dam upon respondent's lands if, as and when petitioner acquired said lands, either by contract or by condemnation. To state the proposition another way, the petitioner had no right to go upon respondent's lands and commence the construction of its project by the mere fact it was armed with a license from the Federal Power Commission. Such a license does not authorize a licensee to build a project upon property of others.

The petitioner's position, therefore, that by force of the federal license it had the right to build a dam upon the respondent's property and that the respondent had no such right, is inaccurate.

In the case of *Hubbard* v. *Fort*, 188 Fed. 987, it was held that one who had obtained from the Secretary of War of the United States approval to construct a certain project by reason of the provisions of the "River and Harbor Bill" did not receive from the Secretary of War authority to construct the project, and in doing so stated:

> "What is affirmative authorization? Affirmative is the antithesis of negative. The use of the word 'af-

firmatively' with 'authorized' would be difficult to understand except for the use of the word 'authorize' in the latter part of this section where the building of certain structures and the performing of certain works are forbidden without the authority of the Secretary of War. As pointed out by V. C. Walker in the New Jersey case, this section 'does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable water of the United States, but only that it shall not be lawful to do the work without the authorization of the Secretary and before beginning the work.' In view of the context, the word 'affirmatively' was legislatively used to distinguish the two kinds of authority referred to, and to make it plain that the initial authorization to create an obstruction was not to rest on implied, but express—affirmative—congressional authority.

* * * * * * * *

"The use of the word 'authorize' instead of 'approve' does not change the Secretary of War's act from promissory to plenary. Two of the definitions of the word 'authorize' are to approve of; to formally sanction. Cent. Dict. & Cyc. What does the Secretary of War authorize? Not the building of the structures mentioned in the second part of this section, but the plans to which such construction is to conform. * * *"

In the case of *Wilson* v. *Hudson County Water District*, 76 N. J. Eq. 543, 76 Atl. 560, the Court of Chancery of New Jersey was called upon to interpret the effect of a license from the Secretary of War to make an improvement in one of the navigable waters of the United States, and in discussing the question the court, in quoting from *Cobb* v. *Lincoln Park Comm'r*, 202 Ill. 427, 67 N. E. 5, among other things said:

"'But however that may be, we are of the opinion that the act prohibiting the erection of wharves

> without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation and that the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of Congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the submerged land on which it is his purpose to build. Appellant, not having by the law of this state, the right to construct a wharf over his neighbor's submerged land without his neighbor's consent, could not acquire that right without his neighbor's consent by obtaining a license from the Secretary of War."

And so it is in the instant case. The petitioner could not acquire a right from the Federal Power Commission to build a dam upon the respondent's property without the consent of the respondent or before condemning respondent's property in accordance with the laws of the State of Oklahoma. In the course of the opinion in the *Wilson* case, *supra*, the New Jersey court observed:

> "Congress may some day be induced to enact a law under the commerce clause of the federal constitution which will make a grant of power such as is contended for by the water company in this case, but up to the present time it has not done so. * * *"

And Congress has not up until this time enacted such a law.

It is respectfully submitted, therefore, that the petitioner by force of a license from the Federal Power Commission had no greater right to construct a hydro-electric plant or dam upon respondent's land than did respondent.

If the petitioner is correct in its position that since it held a license from the Federal Power Commission to

build a dam at the Pensacola site respondent may not recover dam site value, then it must be said that the issuance of the license by the Federal Power Commission affected in a measure the value of respondent's lands in the condemnation proceeding.

Nowhere in the Federal Power Act, however, did the Congress of the United States undertake to declare that its licensee should not be required to pay dam site value and indeed an attempt upon the part of Congress to make such provision would have been void and violative of the Constitution of the United States. The measure of compensation in condemnation proceedings, so far as the Federal Constitution is concerned, is fixed by Amendment 5 and the determination of just compensation is a judicial question. In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 310, 37 L. ed. 463, this Court said:

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.*, 36 U. S. 11 Pet. 420, 571 (9:733,833) Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company

shall pay annually to the college in behalf of the old one a hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled'."

If the Congress of the United States therefore has not the power "to say what compensation shall be paid, or even what shall be the rule of compensation," then the Federal Power Commission may not by the issuance of its license or by any other act fix the measure of compensation. It goes without saying also that a licensee may not fix the measure of compensation by obtaining a license, and by the mere obtaining of it, deprive a land owner of an element of compensation which the land owner would otherwise have been entitled to assert. We have been cited no authorities and have been unable to find any which hold that a condemnor, or the government which grants to a condemnor the power of eminent domain, may fix the measure of compensation to be paid a condemnee for lands taken. The question of the compensation to be paid is a judicial one which neither the legislative branch of the government nor one of its agencies nor the condemnor may control.

VI.

The fair market value of the respondent's lands was not affected and could not be affected by the fact the respondent was or was not a licensee of the Federal Power Commission.

We understand the position of the petitioner and the Solicitor General to be that since respondent was not a licensee of the Federal Power Commission it could not recover the fair cash market value of its undeveloped dam site where that value was fixed by taking into considera-

tion its adaptability as a dam site. It is said that such adaptability could not be taken into consideration because if respondent was not the holder of such a license it could not utilize the dam site lands by constructing a hydro-electric dam upon the same. The Solicitor General at page 11 of his brief points out that neither could an ordinary grantee of the respondent apply the dam site lands to such use.

A similar position was taken by the State of New York in the case of *Waterford Elec. Light, H. & P. Co.* v. *State*, 208 App. Div. 273, 203 N. Y. S. 858, affirmed 147 N. E. 225. In that case the state contended that the company could not have built the dam at the location in question without a federal license; that it had no such license and that when its lands were appropriated by the state the water power seized was valueless. In discussing that point the New York court said:

> "The state also contends that under the River and Harbor Appropriation Act of March 3, 1899, Sec. 9, 30 Stat. 1151 (Section 9971, U. S. Comp. Stat.; Barnes' Fed. Code 1919, Sec. 9437), the claimant could not have built a dam at Van Schoenhoven Rapids without a federal license; that it had no such license; consequently, that when its lands were appropriated the water power seized was valueless. The argument proves too much. Assuming that the act applied to the Hudson River at this point, then, if it barred the erection of a dam by the claimant, it barred the erection of a dam by the state. It is, of course, true that not even the state itself may exercise the power of eminent domain for other than a public purpose.
>
> "* * * However, it is clear that the state, as between itself and the claimant, cannot be heard to raise the bar of the federal act to avoid the payment of compensation, when it has appropriated the claimant's water rights to build, and has actually built, the very dam which it urges was prohibited.

"* * * The state's argument, carried to its logical consequence, would empower the state to appropriate, for purposes other than the improvement of navigation, all the water powers in the state which are situate upon navigable rivers, and enable it, in cases where federal licenses have not been obtained, to limit the compensation to be paid by it to the value of the uplands taken and no more. We think that the argument should not here prevail to limit the compensation payable to this claimant.

"We are not unmindful of the holding in the case of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; 33 Sup. Ct. 667, 57 L. ed. 1063. That case involved the question of compensation to be paid by the United States to a riparian owner whose property had been appropriated by the United States for purposes of navigation. This case involves the question of what the State of New York must pay for an appropriation made by it. Upon that issue the *Chandler-Dunbar* case is not controlling.

"'The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks.' *United States* v. *Cress*, 243 U. S. 316, 319, 320, 37 Sup. Ct. 380, 381 (61 L. ed. 746).

"The courts of this state have determined these rules of property and have decided what the state must pay, and when, in the instances of its seizure of water power rights for purpose of navigation. In these questions the United States has no concern."

The sole question for determination in the state court was the fair cash market value of the real property involved. The trial court heard evidence touching upon this issue. Witnesses were called who expressed their opinion as

to what a willing buyer would give to one not obliged to sell for said lands upon the open market. They testified as to the value of the lands and expressed their opinion without respect to the question of whether respondent had a license from the Federal Power Commission to build a dam. It was the thought of the various witnesses who testified that a purchaser would give from $750,000.00 to $1,000,000.00 for the 417 acres although respondent did not have a license from the Federal Power Commission. Such being the respondent's evidence of value, the case was submitted to the jury. Since the question of the fair cash market value of the lands is and was the only question in the case, let us then analyze the situation and see if the absence of a federal license in the hands of the respondent affected the fair cash market value of the lands constituting the dam site.

If Grand-Hydro before this condemnation action was commenced had offered to sell the 417 acres to a competing public utility corporation, the prospective purchaser would have had no interest in whether Grand-Hydro had a license from the Federal Power Commission, because even if Grand-Hydro had had such license by reason of the provisions of Title 16, Sec. 801, U. S. C. A., no voluntary transfer of such license could be made to the prospective purchaser without the approval of the Federal Power Commission. It is assumed it would be as tedious and as expensive an undertaking to obtain a transfer of such license as it would be to obtain one initially. Also the expired portion of the term of the license would have been lost. If Grand-Hydro in the imagined case had had no license such fact would have had no effect upon the market value of the property to the prospective purchaser, because the purchasing company would have understood that it was obliged before development to make application to the Federal Power Commission for a

license. From a practical business standpoint, therefore, it must be obvious that whether Grand-Hydro did or did not have a license from the Federal Power Commission would not affect the fair cash market value of the property. Moreover, any purchaser of the undeveloped site would have a right to assume that the Federal Power Commission would, upon proper showing, issue to it the essential license. It was said in *Metropolitan Water District* v. *Adams*, (Cal.) 116 P. (2d) 7:

> "The fact that the realization of any of the water importation projects outlined by the engineers would depend upon the solution of problems which might arise in connection with the acquisition of water rights, lands, rights-of-way, easements, state or federal franchises, or other interests essential to consummation of the plans, did not render their testimony too remote or speculative to merit consideration by the jury. * * * Given a sufficiently urgent public demand for additional water, an available supply for importation, and an economical and feasible plan for its transportation, there is certain to be forthcoming the necessary capital to finance the undertaking upon suitable terms, with all essential governmental sanctions, and power in the public agency managing the development to procure, by condemnation or otherwise, all necessary lands, easements, water rights, or rights-of-way."

It has been pointed out elsewhere that the Federal Power Act and the Rivers and Harbor Act of 1899 did not abolish any right the respondent had as a riparian owner to construct a dam upon the river, for as was said in *Pike Rapids Power Co.* v. *Minneapolis, etc., R. Co.*, *supra*:

> "It will be observed that the riparian right to build a dam is not absolutely abolished by this statute; the right is suspended only until the consent of Congress is obtained and the plans have been approved by

the designated officers. The statute merely regulates the use of the right; it does not abolish it."

It follows then that even though Grand-Hydro had no license from the Federal Power Commission it did have a right as a riparian owner to the use of the flow of the stream and had a right in the exercise of that use to construct a dam for the purpose of generating hydro-electric power although that right was subject to be exercised under the supervision of the Federal Power Commission. It should be held in mind that the condemnor in this case is not condemning and taking from the respondent any riparian property right to the use of the water except as it was incident to the land condemned.

VII.

The abstract Federal questions which petitioner states have arisen in the Markham's Ferry case where the United States is the condemnor and other Federal questions which petitioner predicts can or may arise in other litigation fifty years hence and other law questions not within any issue in this case or presented by the record, present no justiciable controversy within the jurisdictional power of this Court to determine.

At page 4 of petitioner's brief in support of petition for rehearing petitioner states that the *Niagara Falls Power* Company case (copied in Appendix "A" to said brief):

> "* * * makes clear that the Federal Power Commission in determining actual legitimate original cost of this project, which is licensed under the Federal Power Act, and in determining petitioner's net investment therein for rate making purposes or for compensation in the event of acquisition by the government at the expiration of the fifty-year license period, will not make any allowance for any inclusion or effect of capitalization of prospective revenues from development of pow-

er in expenditures made by the petitioners. (See Sec. 14 of Federal Power Act.) If the judgment of the Oklahoma Supreme Court stands, petitioner will be required to pay approximately $767,000.00 which it would not be allowed to include in its 'actual legitimate original cost' or 'net investment' based thereon."

This same argument is presented at page 8 of brief *amicus curiae*. ~~We have already presented our view that such would be includible in net investment.~~

This contention, that the petitioner will not be allowed to include the award in this case in its net investment, does not raise a question that need be decided in this case. So far, however, as the language of the decision of the Federal Power Commission in the matter of *Niagara Falls* (decided Nov. 17, 1947), and of *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. (2d) 787, tends to disregard rights recognized by state law, such language must be confined in its effect to the "fair value" section of the Federal Water Power Act, Sec. 23; 16 U. S. C. A., Sec. 816. It has no application to condemnation suits. *International Paper Co.* v. *United States*, 282 U. S. 399.

Section 14 of the Federal Power Act, by fixing the measure of value upon which the government may take over petitioner's project fifty years from now and by fixing the rate base, does not purport to fix the measure of compensation to be paid in a condemnation proceeding for taking private property or property rights. The measure of compensation in condemnation proceedings is fixed by the Constitution of the United States or by the State Constitution, and Congress is without power to determine or fix the measure of compensation in a condemnation proceeding. See *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, 37 L. ed. 463, 468; and *United States* v. *New River Collieries Co.*, 262 U. S. 341, 43 S. Ct. 561, 67 L. ed. 1014.

The right of the United States to take over petitioner's hydro-electric power project fifty years hence by paying petitioner the amount to be determined in accordance with the provisions of Section 14 of the Federal Power Act (16 U. S. C. A. 807) is not based upon the power of eminent domain and is not governed by the constitutional guarantee of just compensation for the taking of private property, but is a condition imposed upon petitioner by its license to construct and operate said project. It has no relation to the measure of compensation petitioner is required to pay for private property it has taken to construct the Pensacola project. In *United States* v. *Appallachian Electric Power Co.*, 311 U. S. 377, 423, 428, 85 L. ed. 243, 260, 263, the respondent power company questioned the validity of Section 14 of the Federal Power Act which exacted as a condition to issuance of license to construct such project, the right to acquire said project at the end of fifty years at less than its fair value in an eminent domain sense. The court said:

> "Such a taking, it is contended, would violate the Fifth Amendment. It is now a question whether the government in taking over the property may do so at less than a fair value. * * * We assume, without deciding that by compulsion of the method of acquisition provided in Section 14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their value. In our view this 'is the price which (respondents) must pay to secure the right to maintain their dam.' The quoted words are the conclusion of the opinion in *Fox River Paper Co.* v. *Railroad Commission.* The case is decisive on the issue of confiscation. * * *"

While the court did in that case pass upon the validity of Section 14 of the Federal Power Act it refused to decide abstract questions of law that might arise fifty years hence,

as well as a number of other similar abstract questions, none of which were actual justiciable controversies in the case before the court. In that connection the court said:

> "The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is upheld, is not before us. We deem the pictured extremes irrelevant save as possibilities for consideration in determining the present question of the validity of the challenged license provisions. To this we limit this portion of our decision."

In *Ashwander* v. *T. V. A.*, 297 U. S. 288, 324, 80 L. ed. 688, it is said:

> "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions. *Muskrat* v. *United States*, 219 U. S. 346, 361, 55 L. ed. 246, 251, 31 S. Ct. 250; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74, 71 L. ed. 541, 544, 47 S. Ct. 282; *Willing* v. *Chicago Auditorium Asso.*, 277 U. S. 274, 289, 72 L. ed. 880, 884, 48 S. Ct. 507; *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 262, 264, 77 L. ed. 730, 735, 736, 53 S. Ct. 345, 87 L. ed. 1191. It was for this reason that the court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the state. *New Jersey* v. *Sargent*, 269 U. S. 328, 70 L. ed. 289, 46 S. Ct. 122. For the same reason, the State of New York in her suit against the State of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diver-

sion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. *New York* v. *Illinois*, 274 U. S. 488, 71 L. ed. 1164; 47 S. Ct. 661. At the last term the court held, in dismissing the bill of the United States against the State of West Virginia, that general allegations that the state challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue 'too vague and ill defined to admit of judicial determination.' *United States* v. *West Virginia*, 295 U. S. 463, 474, 79 L. ed. 1546, 1552; 55 S. Ct. 789. Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial interference. *Arizona* v. *California*, 283 U. S. 423, 462, 75 L. ed. 1154, 1169, 51 S. Ct. 522."

See also, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89, 91 L. ed. 754, 756.

Petitioner's brief in support of petition for rehearing (pp. 6, 7) states that a condemnation proceeding brought by the United States of America against the petitioner and others is now pending and that:

"The question before the United States District Court for the Northern District of Oklahoma in that case is the same as here presented—'whether a condemnee is entitled to compensation for loss of power value in lands (in and on a non-navigable stream over which Congress has jurisdiction under the commerce clause of the Constitution) suitable and adaptable for power use.' This question has never been decided by this court. It was raised in the case of *United States, ex rel. T. V. A.*, v. *Powelson*, 319 U. S. 266, 273, but this court found it unnecessary to pass upon the same and the question is still an open one. Unless this court takes jurisdiction and settles this question, the United States District Court for the Northern District of Okla-

homa must decide this question without the aid of any expressed opinion of this court. * * *"

Petitioner argues that this court should decide this question so that the rule announced may be used in said pending litigation.

The brief *amicus curiae,* pages 7 and 8, makes the same argument and asserts that this point is one of the three interests of the United States in this case, because:

> "The decision of the court below, if allowed to stand, will undoubtedly be relied upon in suits brought by the United States to condemn lands useful as a site for a project which would generate electric power from the waters of a non-navigable stream."

This Court could not have decided in the *Powelson* case whether the Federal Power Act gave Congress the same right of control over the bed and flow of a non-navigable tributary of a navigable stream which it theretofore exercised over navigable streams under the commerce clause of the Constitution, because in that case the Tennessee Valley Authority was an instrumentality of the United States and condemned the land involved on behalf of the United States, as provided by 16 U. S. C. A., Sec. 831c (x), *supra.* The Federal Power Act was not involved. The T. V. A. Act requires the Tennessee Valley Authority to bring the proceedings in the name of the United States and to take title to the land in the name of the United States. In the instant case, however, an entirely different statute is involved and both the condemnor and the condemnee are public corporations, created and existing under and by virtue of the laws of Oklahoma. No sovereign right of the United States is involved. The question presented by the Solicitor General and petitioner is not within the issues of this case. The decision in this case cannot affect any right of the United

States because the United States is not a party to this suit. A determination of that abstract question in this case could not affect the rights of the United States in the Markham's Ferry case or in other cases in which it is or may be a party litigant in the future under acts other than the Federal Power Act. Such decision cannot change or increase the rights of petitioner in this case. In *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 314, 37 L. ed. 747, this Court said:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. * * *"

And in *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, 64 L. ed. 808, it is said:

> "However convenient it might be to have decided the question (stating the question) this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.' * * *"

See also, *St. Pierre* v. *United States*, 319 U. S. 41, 87 L. ed. 1199.

The question (petition for rehearing, p. 5) that petitioner might have compromised this case on two different occasions for less than the sum awarded after trial, which compromise the United States prevented, as well as the argument of petitioner upon its motion for new trial (R. 632-642), as well as petitioner's version of the compromise negotiations in the affidavits attached to petition for rehearing, are irrelevant to respondent's rights in this case. See *Grooms* v. *Johnson*, 192 Okl. 527, 138 P. (2d) 98. Compromise negotiations are not a test of just compensation

in a condemnation proceeding and the negotiations which petitioner asserts took place are foreign to any issue in this case.

VIII.

The Award Was Not Predicated Upon a Hypothetical Project.

We direct attention to the brief *amicus curiae* of the Solicitor General at pages 2, 9, 10, 13, 16, 17 and 18 wherein it is argued that in the instant case the compensation awarded respondent for its dam site lands was based upon appraisals in which the value was arrived at by constructing a hypothetical power project of substantially the same character as petitioner had been licensed to construct (p. 2) and capitalizing the earnings of the hypothetical plant projected for that purpose (p. 9) and that the brief *amicus curiae* challenges the right of respondent to construct a hypothetical power project upon which the land values rest, without appropriate federal authority (p. 18).

This argument finds no support whatever in the record. It is so completely unwarranted by the record that it reveals a material misconception of the evidence in the record. In the brief *amicus curiae* (p. 12, footnote 5) the following appears:

> "One of Grand-Hydro's witnesses was asked 'is your valuation of this dam based upon its being used for a project similar to the one the Grand River Dam Authority has constructed?' He replied (R. 335) 'not entirely similar, but with regard to its use it would be similar'."

That quotation was taken from the cross-examination of Joel D. Justin, a consulting engineer who had testified on direct examination (R. 318, 319, 320) that in appraising respondent's dam site lands he arrived at his estimate as an

undeveloped dam site; that is, the fair cash market value that said lands would have in a transaction between a willing buyer and willing seller, taking into consideration all the uses to which the lands constituting the dam site could within reason be applied, and he excluded from consideration the proposed or existing improvements of the Grand River Dam (meaning the one petitioner was constructing).

At R. 335, from which the brief *amicus curiae* quotes, Mr. Justin had just testified that his valuation of $850,000.00 for respondent's dam site lands was not predicated on a particular size of hydro-electric project and at page 337 he testifies that his valuation is not based upon the height of the dam, that many height dams might be economical at that site:

> "but the most economical would probably be a dam somewhere from 130 to 150 feet high, but this site, there it is, and you have got to have that site before you can build a dam, and it has a certain value, and that value of course, can be based only on judgment and experience, and a fellow might build a dam there, a low dam at first, and then a high one, or he might never build these high dams."

And at page 338, Mr. Justin testified that in placing his valuation on the dam site he had no particular capacity in mind.

In the brief of the Solicitor General (p. 17), it is said:

> "The allowance in a condemnation proceeding of a value for land which is based principally upon power site value of the land due to the possible use thereof for a hypothetical power development, would simply bring into net investment by indirection, in the guise of cost of land, what Congress prohibited in Section 14."

And on page 18 the following statement is found:

> "In the instant case there is a challenge to the right of respondent to construct the hypothetical power project upon which the land values rest, without appropriate federal authority."

The statements quoted above are made in complete disregard of the record in this case. Each of the expert witnesses called by the respondent fixed the fair cash market value of the lands involved by testifying what said lands, as an undeveloped dam site, would bring upon the open market between a willing seller and a willing buyer. See the testimony of Wm. F. Uhl, R. 344-345, of William P. Creager, R. 359, 360, 361, and on cross-examination, R. 363, 364, 367, and the testimony of Robert E. Horton, R. 376, 377, 378, and on cross-examination, R. 383.

The petitioner took the position in the state court that the respondent's proof of the value of the lands involved was of such character as to establish a "hypothetical" or "speculative" value. The Supreme Court of Oklahoma in passing upon that question (R. 101) stated:

> "Grand-Hydro pursued the proper course for determining the market value of the land. It produced witnesses qualified to give their opinion as to that value from the standpoint of the adaptability of the land to every use to which Grand-Hydro might reasonably employ the same. Among those uses was that of dam construction for the development of hydro-electric power for public use. Grand-Hydro produced qualified witnesses who gave their opinion as to the market value of the land for the latter purpose, but their testimony was withdrawn by the court and the jury admonished not to consider the same. The ground assigned for such procedure was that the adaptability of the land to dam site purposes was not an element of market value. In this the court erred."

The Oklahoma court was supported by the record in its holding in this respect.

Conclusion.

It is submitted that either the order granting the petition should be vacated and the writ denied because it was improvidently granted (*Chesapeake R. Co.* v. *Bryant*, 280 U. S. 404, 74 L. ed. 513), or the judgment of the state court should be affirmed.

Respectfully submitted,

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